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IN THE

Supreme Court of the United States

October Term, 1980

ARTHUR ANDERSEN & COMPANY,
Petitioner,

and

UNITED STATES OF AMERICA, and FRANCIS W. MURPHY,
Special Agent, Internal Revenue Service,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF *AMICUS CURIAE* OF AMERICAN INSTITUTE OF CERTIFIED PUBLIC ACCOUNTANTS IN SUPPORT OF THE PETITION FOR CERTIORARI

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PRELIMINARY STATEMENT

This Brief is submitted by the American Institute of Certified Public Accountants (the "AICPA") as *amicus curiae,* with the consent of all parties, pursuant to Rule 36.1 of this Court.[1] The AICPA urges this Court to grant the Petition for Certiorari in order to decide both questions presented by the Petitioner.

1. Consent to the filing of this Brief has been given by the United States in the letter of the Solicitor General dated September 23, 1980, and by the Petitioner in the letter of its counsel dated September 26, 1980, each of which was filed by its author with the Clerk of this Court at the time it was sent.

INTEREST OF THE AICPA AS *AMICUS CURIAE*

The AICPA is the only national accounting association whose membership is limited to certified public accountants; it has approximately 160,000 members. Among its purposes are the promotion and maintenance of high professional standards of practice, including the development of authoritative auditing standards. The AICPA also seeks to identify, examine and address issues affecting the accounting profession as a whole.

Such issues are presented in this case. The decision of the Court of Appeals compels an auditor to stand in contempt in order to obtain appellate review of a district court order enforcing an IRS summons to obtain materials from a taxpayer's independent certified public accountant, even though the financial facts contained in the materials are otherwise available to the IRS, and even though disclosure of such materials to the IRS will have a concomitant effect of infringing on the integrity and appropriate confidentiality of the audit process.

This question transcends the issues as presented by the parties litigant; its resolution affects every auditor. As the AICPA elaborates more fully in its Argument, the combination of the apparent decision of the IRS to seek production of such papers in unexceptional cases, and the denial of appellate recourse to affected auditors except by incurring contempt, imposes truly insupportable and unjustifiable burdens on such professionals who wish to discharge their duties in a lawful and ethical manner.

The order below was founded on an incorrect perception of the applicable law, as applied to the facts of this case, and, accordingly, the AICPA urges its reversal.

STATEMENT OF THE CASE

The Proceedings Below

Arthur Andersen & Company ("Andersen") was served with a summons pursuant to 26 U.S.C. § 7602 (1976) directing it to testify and to produce for examination various records allegedly relating to the tax liabilities of one of Andersen's clients, Good Hope Industries, Inc. ("Good Hope"). It agreed to produce all documents except its tax accrual workpapers.

The United States District Court for the District of Massachusetts dismissed the objections of Andersen and of Good Hope, as intervenor, and on July 23, 1979, ordered Andersen to produce the tax accrual workpapers. In so doing, it expressly refused to follow *United States* v. *Coopers & Lybrand,* 550 F.2d 615 (10th Cir. 1977), the only authority directly on point. Andersen promptly appealed. Only after a stay of the order of enforcement was denied by the district and appellate courts and by a Justice of this Court, did Andersen produce the tax accrual workpapers.

The United States Court of Appeals for the First Circuit thereupon dismissed the appeal as moot in an opinion dated March 31, 1980. (A-1)[2] The Court held that, to preserve its right of appeal, an auditor must contemptuously disobey the district court's order requiring production.

Tax Accrual Workpapers Defined

Tax accrual workpapers contain materials gathered or prepared by an independent certified public accountant as

2. References denominated by "A" are to the Appendix annexed to the Petition for Certiorari.

part of his audit of the financial statements. Tax accrual workpapers concern only the adequacy of a client's provisions for potential tax liability. They are not used in the preparation of the client's tax returns.

Audits of public companies are required by § 12 of the Securities Exchange Act of 1934, 15 U.S.C. § 78(1) (1976) and Regulation S-X, 17 C.F.R. § 210.1-01 *et seq.* (1976). Accruals for unpaid taxes are an integral component of the financial statements required to be filed by registrants with the Securities and Exchange Commission and must be analyzed by the auditor. Financial Accounting Standard Board Statement No. 5 (1975); Statements on Auditing Standards No. 2 (1974), No. 12 (1976) and No. 17 (1977).

Essentially, tax accrual workpapers reflect the accountant's evaluation of the adequacy of the client's accrual or "reserve" for income taxes in relation to the client's financial statements taken as a whole; this evaluation is based on the independent certified public accountant's analysis of the client's records and the assessment of opinions and speculative projections communicated in confidence to the auditor by the client's personnel or counsel. Such workpapers also usually contain the *auditor's* judgments as to possible tax questions, alternative treatment and positions, and similar nonfactual matter.

As in general, so here, the factual information concerning Good Hope's business transactions was derived from Good Hope's books and records, full access to which was given the IRS.[3] Notwithstanding its review of the client's books

3. *See* Affidavit of Wilbur Duncan, sworn to on March 27, 1979, at paragraphs 5-18 designated as Document 9 in Appellant's Appendix filed with the First Circuit; Transcript of Hearing, March 22, 1978 ("Transcript of Hearing"), at 100-09 designated as Document 4 in Appellant's Appendix filed with the First Circuit.

and records, the IRS was unable to specify how production of the tax accrual workpapers would aid its investigation other than by providing convenience.

SUMMARY OF ARGUMENT

The holding below that, in the absence of contemptuous non-compliance with the district court's order enforcing an IRS summons, an independent public accounting firm must forfeit its right to appeal the propriety of the order and of the summons, and the standards upon which that result was reached, raise highly disturbing inmplications concerning every independent auditor of financial statements. This inequitable result would compel auditors summoned by the IRS to divulge their opinions and the speculations of their clients or to stand in contempt merely to qualify to appeal a point of law. No such result is permitted, much less required, by the cases in this Court or in other courts which have considered analagous situations. Such an outcome would also contravene both the explicit intent of Congress in providing for meaningful judicial review of summonses issued by the IRS and compelling policy considerations which favor encouraging respect for court orders and expedition in IRS investigations.

The conceded importance of the substantive issue in this case, moreover, should have induced the court below to entertain it. By declining to examine this substantive issue, the Court of Appeals left in place a district court determination that is in conflict with the law in the other circuit which has addressed the question. Real and substantial rights are presently at stake. There is great need to resolve the tension that exists between the expedition favored by the administration of the tax laws, on the one hand, and the freedom to communicate in appropriate confidence that

is necessary for the performance of the audit function and the provision of adequate information to the investor, on the other. As a matter of law and in the interest of justice the real and live controversy which exists in this case should not be avoided, but resolved.

REASONS FOR GRANTING THE WRIT

I.

THE DECISION BELOW HOLDING THAT THIS CASE IS MOOT CONFLICTS WITH HOLDINGS OF THIS COURT AND OTHER CIRCUITS IN THAT IRS SUMMONSES OF ACCOUNTANTS ARE CAPABLE OF REPETITION YET EVADE REVIEW; IGNORES THE MANDATE FOR FULL JUDICIAL REVIEW OF IRS SUMMONSES; AND IS SERIOUSLY INAPPROPRIATE FOR POLICY REASONS.

The First Circuit, in holding that this case was mooted by Andersen's having produced the documents summoned, avoided its duty to decide cases and controversies in congressionally prescribed areas. Congress clearly vested the federal courts with jurisdiction to hear these cases, 26 U.S.C. § 7604 (1976), and the matters at issue could not be more controverted.

This case presents a classic example of an issue "capable of repetition yet evading review" which the courts have long refused to dismiss as moot. *Southern Pacific Terminal Co.* v. *ICC*, 219 U.S. 498 (1911).[4] It is precisely the

4. *See also, United States Parole Comm'n* v. *Geraghty*, —— U.S. ——, 100 S.Ct. 1202, 48 U.S.L.W. 4296, 4299 (March 19, 1980); *Gannett Co.* v. *DePasquale*, 443 U.S. 368 (1979); *SEC* v. *Sloan*, 436 U.S. 103, 108-10 (1978); *First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 774 (1978); *Weinstein* v. *Bradford*, 423 U.S. 147, 149 (1975); *Super Tire Engineering Co.* v. *McCorkle*, 416 U.S. 115, 125 (1974); *Roe* v. *Wade*, 410 U.S. 113, 125 (1973); *Moore* v. *Ogilvie*, 394 U.S. 814, 816 (1969).

likelihood of repetition of the present controversy which makes the instant issue one of such serious and immediate concern to the AICPA and its members, and has provoked its *amicus* participation.

1. The Issue Is Conceded to Be Capable of Repetition.

That the issue is likely to recur was conceded by the First Circuit (A-4) and that concession is supported by its actual reoccurrence. For a number of years the Federal Taxation Division of the AICPA conducted discussions with the IRS to develop guidelines pursuant to which materials would be obtained by the IRS from auditors. As a result of those negotiations, the IRS agents' manual was amended to recognize that the public accountant's workpapers should normally be used only as a collateral source and that access to them should be requested with discretion. IR Manual, MT 9900-36 §§ 267.2(5), 267.51(2) (3-1-77).

Notwithstanding these discussions, the IRS has in recent years proceeded to summon accountant's workpapers, including tax accrual workpapers, in cases in which it had not previously sought them. In 1975, the IRS sought to enforce a summons served on Coopers & Lybrand for the tax accrual workpapers and audit programs with respect to the audit of its client, Johns-Manville Corporation. The district court denied enforcement of the summons, *United States* v. *Coopers & Lybrand,* 413 F. Supp. 942 (D. Colo. 1975), and was affirmed on appeal. 550 F.2d 615 (10th Cir. 1977).

Representatives of the IRS, however, have since publicly asserted that the Tenth Circuit's decision in *Coopers & Lybrand* was wrong. Those representatives have contended that the Service has the authority to obtain accountant's workpapers, including tax accrual workpapers, and

that the Service can be expected to exercise that authority in the future. For example, in May, 1979, the then-chief counsel of the IRS, in an address to the Federal Taxation Division of the AICPA, stated that the IRS intended to seek accountant's workpapers in appropriate cases and that there was likely to be recurring litigation to enforce summonses for those workpapers (A-4).

This case obviously presents precisely such an attempt to enforce a summons of the character rejected by the Tenth Circuit in *Coopers & Lybrand* and reflects a continued effort by the IRS to exercise an authority which the court there declined to recognize. It is hard to imagine a controversy more aptly described as "capable of repetition".

This case thus falls squarely within the doctrine, recently affirmed by this Court in *Gannett Co.* v. *DePasquale,* 443 U.S. 368, 377 (1979), that jurisdiction is to be upheld even where the order attacked has expired, if the issue is one "capable of repetition, yet evading review."

In *Gannett,* a publisher had challenged a trial court ruling excluding the press from a pre-trial suppression hearing and from access to the hearing transcript. Even though the petitioner eventually obtained access to the transcript, the appeal was not mooted, this Court held, because the underlying dispute was one "capable of repetition, yet evading review" since the publisher could be subject to closure orders in the future. That, as the court below found, is precisely the case here.

2. Appellate Review Evaded.

The second branch of this Court's test was also easily satisfied here. The First Circuit avoided appellate review of the substantive issue by mooting Andersen's appeal and by declining to pass on it in Good Hope's appeal. The court

thus left the district court holding intact and in conflict with that of the Tenth Circuit in *United States* v. *Coopers & Lybrand.*

It is at this point that the twin anomalies of the opinion below emerge. First, the First Circuit would make the right of appeal one-sided. The Government appealed a result unfavorable to it in *United States* v. *Coopers & Lybrand.* Yet the First Circuit would have accountants take the additional step of incurring contempt in order to present exactly the same issue in a case in which they are aggrieved by the district court's order. This lack of mutuality of recourse makes no sense, and invites review if for no reason other than supervision.

A second anomaly lies in the reasoning of the First Circuit's opinion. In essence, it ruled that the stronger an appellant's interest in a matter, the more likely it is of repetition and less likely to avoid review. This reasoning stands the mootness test on its head. A case should not be found moot because the appellant has a strong interest in pursuing the controversy.

Rather, this Court has considered whether "... 'the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration,' ..." *Gannett & Co.* v. *DePasquale, supra,* 443 U.S. at 377. Here, that criterion is easily satisfied. In typical fashion, the IRS summons issued here called for production within a relatively brief period and the district court order, notwithstanding various requests for a stay, required compliance long before an appeal could be briefed, argued and decided.

The present controversy, therefore, also meets the second test: The issue is one which would "evade review" as that term has developed meaning in the cases. *See Nebraska Press Ass'n* v. *Stuart,* 427 U.S. 539 (1976) ("gag order" for duration of criminal trial); *Roe* v. *Wade, supra,* 410 U.S. at 124 (266 day human gestation period in pregnancy related litigation).

The refusal of the court below to apply this doctrine in an appeal from an enforcement order which had been com-

plied with, puts it in direct conflict with the Seventh Circuit on the question. In *Matter of Special April 1977 Grand Jury,* 581 F.2d 589 (7th Cir.), *cert. denied,* 439 U.S. 1046 (1978), the target of a grand jury investigation had moved to quash grand jury subpoenas *duces tecum* served upon members of his staff, calling for the production of certain campaign records and other documents. The subpoenas were modified in part by the district court, but the motion to quash was denied. After a stay of enforcement of the order had been denied by the district court, by the Seventh Circuit, and by this Court, the subpoenas were complied with.

Such compliance with the subpoenas did not moot the appeal, the Seventh Circuit held, because the nature of the action being challenged by appellant was "too short to be litigated fully prior to appellant's compliance." 581 F.2d at 591. To this the court added that it could reasonably be expected that since the subpoenas were part of a continuing investigation, future subpoenas, to which similar objections would be made by appellant or by others, were likely. *Id.* In words strikingly appropriate to the instant controversy, the court observed that a litigant who disputes a lower court order of enforcement should not need to risk contempt in order to obtain appellate review:

> "While it could be argued that appellant could have obtained review before compliance by refusing to supply the documents and appealing a subsequent finding of contempt, the Supreme Court has not required litigants to subject themselves to contempt or criminal sanctions in order to meet this prong of the mootness test. *See, e.g., Nebraska Press Association* v. *Stuart,* 427 U.S. 539, 96 S.Ct. 2791, 49 L.Ed.2d 683; *First National Bank of Boston* v. *Bellotti, supra.*"

Id.

Precisely identical considerations should have led the court below to entertain and decide this appeal on the merits.

3. The Importance of the Issue Precluded a Finding of Mootness in this Case; The Holding Below to the Contrary Raised an Additional Conflict Among the Circuits.

In rejecting this appeal of a concededly important issue, (A 8-9), the court below also placed itself at odds with the decision of the Third Circuit *en banc* in *United States* v. *Frumento,* 552 F.2d 534, 536-41 (3d Cir. 1977). There, a witness who declined to testify in a criminal trial after receiving a grant of immunity was confined pursuant to a finding of civil contempt and he was released from confinement upon its completion. The Third Circuit held that, regardless of whether the case was "capable of repetition" as to the appellant, his appeal was nevertheless not moot because of the significance of the interests at stake. The majority wrote:

> "While in each of the instances discussed, the Supreme Court has determined that 'capability of repetition' existed, we are of the view that such capability was perceived so as to satisfy the true governing consideration behind the Court's decision —that of having review available when significant interests are at stake. We are satisfied that [appellant's] confinement pursuant to an order of contempt, whether or not it is capable of repetition within the exact same framework, must not escape desired review any more than should 'gag orders' where the reason for the 'gag' no longer exists; pregnancies, where the pregnancies have terminated; or strikes, where the dispute has been settled."

Id. at 540.

That this case involves an issue of such significance cannot be doubted. The First Circuit conceded as much in the companion Good Hope appeal:

> "The importance of the interests of all concerned —taxpayers, accountants and IRS—is clear. That a resolution sensitively reflecting the legitimate interests of all and faithful to applicable statutes

> would involve the most delicate and demanding analysis of facts, research of law, and reflection on policy is equally clear. Precisely because we view the issue of 'relevance' as so significant, we find this case [*i.e.*, the second appeal, by Good Hope] in a poor posture to serve as the matrix for a precedent."

A-36.

It is an irony worth noting that the court below managed to find this "significant" issue moot when presented by the auditor but premature when presented by his client. By this remarkable maneuver, the lower court evaded its responsibility to decide this delicate and important issue.

4. The Decision Below Disregards the Mandate of Full Judicial Review of IRS Summonses.

The responsibility to decide the issue presented here is rather more specific than the general duty of courts to decide properly tendered controversies. The duty to review IRS summonses is congressionally mandated. In 26 U.S.C. § 7604 (1976), Congress required application to and a hearing by a federal district court for "full opportunity for judicial review *before any coercive sanctions may be imposed.*" *Reisman* v. *Caplin*, 375 U.S. 440, 449-50 (1964) (emphasis supplied). That supervisory responsibility imposes the serious obligation to scrutinize challenged summonses with care to determine that the production of material called for is within the parameters established by the statute and by the policy considerations implicit in judicial review.[5] As this court observed in *Reisman, supra*, 375 U.S. at 450, court orders enforcing IRS summonses are fully appealable. Indeed, since such a court order of

5. *See, e.g., United States v. Coopers & Lybrand*, 550 F.2d 615 (10th Cir. 1977), *aff'g*, 413 F. Supp. 942 (D. Colo. 1975); *United States* v. *Matras*, 487 F.2d 1271 (8th Cir. 1973); *United States* v. *Theodore*, 479 F.2d 749 (4th Cir. 1973); *Hubner* v. *Tucker*, 245 F.2d 35 (9th Cir. 1957); *United States* v. *Goldman*, 453 F. Supp. 508 (C.D. Cal. 1978); *United States* v. *Williams*, 337 F. Supp. 1114 (S.D.N.Y. 1971); *United States* v. *Third Northwestern National Bank*, 102 F. Supp. 879 (D. Minn. 1952).

enforcement is a final decision, it is appealable as of right. 28 U.S.C. § 1291 (1976). A holding that a third party (*i.e.*, not the taxpayer-subject of the IRS investigation) must stand in contempt in order to preserve his controversy from mootness effectively frustrates the system of judicial review and appeal established by Congress and recognized in *Reisman*.

5. Strong Policy Reasons Favor Application of the Capable-of Repetition-Yet-Evading-Review Doctrine in These Circumstances.

These highly disturbing implications of the holding below are compounded by the lesson the court below would teach. In ruling that an accountant, having nothing to gain, must stand in contempt merely to preserve a point of law, the court encouraged not only violation of duly entered court orders but disrespect for them and the processes leading to their issuance.

This attempt to close the judicial system, moreover, offers no significant advantages and, in practice, may protract IRS investigations. A rule that production of the papers waives the right to challenge the summons obviously puts a premium on withholding the papers. The rule below thus cuts against the interest it was supposed to serve.

No identifiable interest of tax or judicial administration is served by requiring an auditor to stand in contempt in this way. This case shows that the underlying issue remains fully and adequately presented. Exposing an auditor to jail and fines, with the consequent impact on his reputation, professional standing, employment record and credit rating affords no social or judicial benefit.

The First Circuit seems to suggest that standing in contempt is merely a procedural step, a sort of pleading whose principal consequence is to preserve a question for further litigation. It is much more than that; its real, immediate consequence is to expose the auditor to genuine coercive

sanctions and unacceptable hardships.[6] Both the unseemliness of forcing an auditor to pursue this unlawful course in order to obtain judicial review of what he regards as an ethically required position, and the inordinate consequences he risks by doing so, argue forcefully against adopting so draconian a rule.

II.

CERTIORARI SHOULD BE GRANTED TO ENTERTAIN THE SECOND ISSUE RAISED BY THE PETITION BECAUSE OF ITS IMPORTANCE TO ADMINISTRATION OF THE TAX LAWS AND TO RESOLVE THE CONFLICT AS TO ITS RESOLUTION.

The importance of the underlying issue itself and the conflict between the district court holding which was left in place by the First Circuit and the Tenth Circuit's ruling in *United States* v. *Coopers & Lybrand, supra,* additionally make the second issue raised by the Petition highly appropriate for certiorari.

Indeed, the importance of the issue is conceded by the court below. That concession was provident. The cognate questions of what standards of relevancy are applicable to IRS summonses of third parties and whether such production of tax accrual workpapers should be enforced only upon a showing of need for factual information are highly significant to the relationship of auditors and clients and of great import to administration of the tax laws, and the provision of full disclosure to the users of financial statements.

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6. The point is not illusory. In 1975, a partner in another national accounting firm, who sought to preserve a very similar question for appeal by the contempt route suggested by the court below, was jailed. *In re Grand Jury Subpoena Duces Tecum, William A. Grant, Jr. and Arthur Young & Co.,* 75 Cr. No. 139 (N.D. Okla. Oct. 6, 1975), Wall St. J., Oct. 8, 1975 at 10, col. 2 (Eastern ed.).

1. The Carte Blanche Discovery of Tax Workpapers by the IRS as Sanctioned Below Sharply Impacts the Ability of Auditors to Perform and Should Not Be Permitted.

To auditors and to the AICPA, the question involves nothing less than the ability to perform effectively the significant audit function of testing a client's reserve for taxes. These reserves are often highly material to the financial statements of publicly and privately held companies. Yet, disclosure of the judgmental materials that comprise tax accrual workpapers, as ordered by the district court in this case, would have a serious impact on the willingness of the client to discuss these matters and the ability of the auditor to function. See, *e.g.*, Testimony of Wilbur Duncan, Transcript of Hearing, at 107-08.

Because of the sensitivity of the opinions, conjectures and speculations—both those received by independent certified public accountants from their clients' personnel and those formulated by the auditors themselves—it was not in the contemplation of the AICPA, when it promulgated its Statements on Auditing Standards, that such materials would be routinely available to the IRS for the asking. Indeed, the AICPA Federal Taxation Division believed, from discussions with the IRS extending over several years, that the IRS understood the importance to the audit process of maintaining the confidentiality of such client information and that a tacit agreement with the IRS existed that access to tax accrual workpapers would not be requested except in extraordinary cases.

The IRS *Handbook for Special Agents* was accordingly amended to provide, in relevant part:

> ". . . The inquiry cannot amount to an inquisition or arbitrary inquiry on the part of the tax investigators. A reasonable basis for making the inquiry must exist. What is justifiable 'fishing' will be determined from all the facts in each case including the end for which the information is sought. *The investigation must not be an unreasonable burden on the third party whose records are sought.*

> In a fraud case, a test as to whether the examination would impose an unreasonable burden is whether the facts show *a reasonable ground of suspicion or probable cause* for the examination to ascertain if there has been a fraud. *The burden upon the third party must be considered in relation to the expected degree of success in finding documents bearing upon the tax liability of the taxpayer being investigated.*" IR Manual, MT 9900-36 §§ 267.2(5) and 267.51(2) (3-1-77) (emphasis added) (footnotes omitted).

And with respect to the workpapers of an independent certified public accountant, the IRS promulgated guidelines requiring that such workpapers be used only as a "collateral source, access to which should be requested with discretion":

> "[E]xaminers will not request access to such workpapers as a matter of standard examining procedure in every case. The access sought should be only to the portion of the workpapers believed to be material and relevant to the examination. In determining materiality and relevance in this context, the examining officer should keep in mind that the taxpayer's records are the primary source of information and the accountant's workpapers should normally be used only as a collateral source, access to which should be requested with discretion. Since audit workpapers are ordinarily the property of the accountant or accounting firm, access normally will be provided by the accountant at his/her office, the office of the taxpayer, or some other suitable location." IR Manual, MT 4000-161 § 4024.2 (6-11-79).[7]

It was on the basis of these statements that then IRS Commissioner Donald C. Alexander assured Congress that the IRS would not issue summonses such as that which it did

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7. While this guideline does not apply in cases "under joint investigation with the Intelligence Division," *Id.*, § 4024.1(2), the indicated limitations on the circumstances under which the IRS should request workpapers are totally consistent with the general standards noted in the quotation above from the *Handbook for Special Agents*, which does govern the conduct of Intelligence Division cases.

serve on Andersen and now threatens to serve on auditors generally:

> "The Service has long recognized the responsibility which it bears in administering this power. Our procedures regarding the use of the administrative summons clearly reflect this concern. . . .
>
> The discussion [in the Intelligence portion of the *Internal Revenue Manual*] of the use of the administrative summons makes it clear that the first duty of the service representatives is to obtain all information from taxpayers and third parties voluntarily. Several reflective, cautionary paragraphs of our investigative procedures spell out the seriousness attendant upon the issuance and enforcement of a summons, all bearing out the basic message that a summons should be issued only when other avenues of achieving voluntary access have been exhausted, and when the value of the information sought will clearly outweigh the time, expense and legal impact involved."

Testimony of Donald C. Alexander, Commissioner of Internal Revenue, Before the House Subcommittee on Courts, Civil Liberties and Administration of Justice, *BNA Daily Tax Report,* September 9, 1975, at J-9.

In this case, the IRS has ignored its tacit agreement with the AICPA; it has disregarded the tenor of its own general guidelines concerning circumstances under which disclosure of the workpapers of accountants would be sought and has sought to establish a new precedent that tax accrual workpapers will be routinely available to the IRS pursuant to administrative summonses. IR Manual, MT 4000-174 § 4024.3 (6-12-80).

All of this is having its predicted result. As reported recently,

> "Corporate tax directors see a number of alarming possibilities if the IRS continues its hard line. [Allstate Insurance Company tax director] Baudendistal, . . . warns that 'since we'd know that whatever passed

> between us and our accountants could reach the IRS, we would begin to treat the CPAs as we do Internal Revenue. We would give them much less information, and the relationship would weaken.'"

"A Losing Fight to Shield Company Tax Secrets", *Business Week,* 117 (June 16, 1980). Certiorari should be granted to determine whether the law requires this undesirable result.

2. The Second Issue Is the Subject of a Practical Conflict Between the First and Tenth Circuits and Should Be Resolved.

These considerations, coupled with the fact that hard data are to be found, not in the tax accrual workpapers, but in the books and records of the client-taxpayer available to the IRS, led the district and appellate courts in *United States* v. *Coopers & Lybrand, supra,* to define relevance so as to exclude such workpapers from the embrace of 26 U.S.C. § 7602 absent a showing by the IRS of special need. As the Tenth Circuit ruled, these papers offer the IRS merely a convenience in analyzing the corporate taxpayer's books and records. 550 F.2d at 621. The "IRS does not, as it appears to assume on this appeal, have *carte blanche* discovery." *Id.* at 619.

In so ruling, the Tenth Circuit adopted and applied to tax accrual workpapers the analysis of the Eighth Circuit in *United States* v. *Matras,* 487 F.2d 1271 (8th Cir. 1973) and the Fourth Circuit in *United States* v. *Theodore,* 479 F.2d 749 (4th Cir. 1973). In *Matras,* the Eighth Circuit ruled that, "The term 'relevant' connotes and encompasses more than 'convenience.'" 487 F.2d at 1275. In *Theodore,* the Fourth Circuit similarly affirmed with respect to summonses of third parties:

> "A summons will be deemed unreasonable and unenforceable if it is overbroad and disproportionate to the end sought. . . . [W]here it appears that the purpose of the summons is a 'rambling exploration'

> of a third party's files, it will not be enforced. . . . Indeed, we agree with Judge Lumbard that '[t]his judicial protection against the sweeping or irrelevant order is *particularly* appropriate in matters where the demand for records is directed not to the taxpayer but to a third-party who may have had some dealing with the person under investigation.'" 479 F.2d at 754 (citations omitted).

That the burdens on the auditing process should require a showing of special need consisting of inability to obtain otherwise the factual information sought before disclosure of tax accrual workpapers will be ordered is clear enough, has its analogue in civil discovery cases,[8] and, until this case, had remained uniformly decided.[9] Clarification, however, is now needed because of the *carte blanche* approach of the district court below in ordering production of tax accrual workpapers at the behest of an IRS agent who argued only that they might be convenient. Certiorari should be granted to resolve the conflict and settle this highly important issue.

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8. *See, e.g., Covey Oil Co.* v. *Continental Oil Co.*, 340 F.2d 993 (10th Cir.), *cert. denied*, 380 U.S. 964 (1965) (discovery of confidential business information); *Carlson Companies, Inc.* v. *Sperry and Hutchinson Co.*, 374 F. Supp. 1080, 1088 (D. Minn. 1974) (" . . . when [discovery] requests approach the outer bounds of relevance . . . the Court must then weigh [the] request with the hardship to the party from whom the discovery is sought.").

Considerations such as these have prompted the recognition of relational privileges between lawyer and client, physician and patient, and clergy and penitent. The AICPA fully recognizes that federal law at present recognizes no such privilege for the auditor-client relationship and the considerations proposed in the text are not advanced for the purpose of procuring treatment tantamount to such a privilege. Rather, it is the position of the AICPA that such policy considerations must be taken into account in determining whether the showing made by the IRS for production of the auditor's papers in a particular case satisfies the standard of relevancy.

9. The issue was expressly reserved by the Second Circuit in *United States* v. *Noall*, 587 F.2d 123, 127 n.5 (2d Cir. 1978), *cert. denied*, 441 U.S. 923 (1979). There the court held only that an IRS summons could reach reports by *internal* corporate auditors. The case did not involve the impact on the ability of independent auditors to function.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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